

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 210  
5365012

BETWEEN            KANA SHANMUGANATHAN  
                                 Applicant

AND                    POWERNET LIMITED  
                                 Respondent

Member of Authority:     David Appleton

Representatives:         Mary-Jane Thomas and Riki Donnelly, Counsel for  
                                 Applicant  
                                 Janet Copeland, Counsel for Respondent

Investigation Meeting:    21 December 2011 at Invercargill

Submissions received:    21 December 2011 from Applicant  
                                 21 December 2011 from Respondent

Determination:            23 December 2011

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**DETERMINATION OF THE AUTHORITY**

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- A.     The application by Kana Shanmuganathan for interim reinstatement pending the hearing of his personal grievance is granted on the conditions set out in this determination.**
- B.     Costs are reserved.**

**Employment Relationship Problem**

[1]     On 29 November 2011 the applicant applied to the Authority for an order for interim reinstatement to his former position as System Control Manager with the respondent. His application was accompanied by an undertaking from him as to damages, in accordance with s. 127(2) of the Employment Relations Act 2000 (“the Act”).

[2] The Applicant had been dismissed on 14 November 2011 on notice for serious misconduct. The dismissal followed an investigation which began on 27 September 2011, at the conclusion of which the respondent determined that the applicant had made excessive and unacceptable use of its landline and mobile telephones, email and internet access, server and time for the purposes of conducting his own private business affairs.

[3] It was well known within the respondent company that the applicant, who had worked for it for eleven and a half years, owned a number of properties in and around Invercargill which he leased to commercial enterprises. During a routine review of the internet usage by the respondent's staff, a concern had been noted that managers' internet usage within the Network Operations Team, in which the applicant worked, was high. This led to a review of the applicant's email traffic, which revealed a number of emails sent and received by the applicant which were unrelated to the respondent's business but instead related to the applicant's business interests. Subsequent investigation also revealed what seemed to be a high number of personal calls being made on the applicant's landline and mobile telephones.

[4] The respondent's concerns were drawn to the applicant's attention by way of a letter dated 27 September 2011. The applicant was informed that the activity revealed by the investigations suggested serious misconduct by way of:

(i) *Unauthorised use of property of the employer;*

(ii) *Unauthorised access to the employer's computer system.*

[5] Both of these were categories of misconduct identified in the applicant's employment agreement as possibly rendering him liable to summary dismissal. The letter also referred to the respondent's computer policy, which states, inter alia, that the internet and email must not be used for commercial gain or personal business use.

[6] A disciplinary process ensued during which the applicant was represented by counsel throughout. The applicant was given access to all the emails and telephone records that caused the respondent concerns and had an opportunity to explain his position. He was also given an opportunity to comment on the respondent's proposal

that he should be suspended, and later, invited to make submissions on the respondent's preliminary conclusion that he be dismissed. The applicant's counsel recommended that he be given a final written warning.

[7] Although no formal warning was live on the applicant's file at the time of his dismissal, the applicant had been informally warned previously about his email usage. On 6 October 2009, his manager, Gary Pritchard, had advised him by email that, having reviewed the applicant's email traffic, Mr Pritchard regarded the amount that appeared to be personal and non work related to be significant. The applicant had been told by Mr Pritchard that it was important to ensure that his time was spent productively and appropriately while in PowerNet's employment and had been advised to limit the personal emails and to refrain from sending spam, joke emails and emails with inappropriate content. Mr Pritchard had stated that Janet Ellis (the HR Manager) and he would be monitoring the situation for improvement.

[8] In a separate email sent to the applicant on 13 October 2009, Mr Pritchard had asked the applicant to take active steps to reduce the personal email traffic that week and had stated that his advice would be to reduce the traffic to a negligible amount.

[9] On 29 July 2010, Mr Pritchard had sent the applicant another email referring to some recent email communication involving the applicant which Mr Pritchard had stated was inappropriate. Mr Pritchard had reminded the applicant that he was to refrain from sending spam, joke emails and emails with inappropriate content. Mr Pritchard had stated that the company would monitor the situation and if there was a recurrence, *further steps may be taken*. He had ended his email by asking the applicant to try to avoid any unnecessary email communication.

[10] On 2 February 2007 the applicant had received a final written warning (stated to be live for two years) in respect of misuse of the respondent's 0800 Faults Line Number. In addition, the applicant had had to repay to the respondent reparation of \$7,500, had his salary reduced by \$10,000 and had had to address Control Room staff in relation to the issue (effectively, to apologise to them).

**Principles of interim reinstatement**

[11] The correct approach to be adopted by the Authority in determining an interim reinstatement application is by applying the law relating to interim injunctions while also having regard to the object of the Act (s. 127(4)). The Applicant must first establish that he has both an arguable case of personal grievance for unjustified dismissal and an arguable case that he would thereafter be reinstated in employment rather than simply compensated financially.

[12] Next, the Authority must apply an assessment of the respective positions of the parties until the investigation and determination by the Authority of the substantive issues by considering the balance of convenience between the parties. This assessment includes considering whether interim reinstatement is necessary if other remedies would be adequate.

[13] Finally, as the remedy is discretionary, the Authority steps back to take a global view and determines where the overall justice of the case lies until it can be heard (which includes considering the respective strengths of each parties' case as far as they can be ascertained at this stage).

[14] Although the evidence at an interim stage is in affidavit form and therefore untested and possibly incomplete, in this particular case a significant volume of documents were produced evidencing the steps taken in the investigation and including a sample of the emails found in the applicant's email folders which appeared to relate to his private business affairs. Two DVDs containing all of the historic information, files, documents and email communication found on the applicant's work computer were also produced, although I did not peruse these due to a shortage of time. The respondent's counsel had also not reviewed the contents of these DVDs.

**Arguable case for unjustified dismissal?**

[15] The principles applying to justification for dismissal and reinstatement at an interim level were recently considered by the full Employment Court in *Angus v Ports*

of Auckland [2011] NZEmpC 160. When applying s 103A in practice, the Court said the following:

[57] *The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employee's dismissal or disadvantaging of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.*

[58] *Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.*

[59] *Finally, in determining justification under new s 103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or the Authority must do so objectively, that is ensuring that they do not substitute their own decisions for those of the fair and reasonable employer in all the circumstances.*

[16] In reviewing the employer's decision, the Authority must also be satisfied that the evidence in support of conclusions reached by the employer is as convincing in its nature as the alleged serious misconduct was grave. *Honda NZ v NZ Shipwrights Union* ERNZ Sel Cas 855 at 858 (CA).

[17] An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success. *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[18] It is my view that the applicant does have a tolerably arguable case that he will prove his case of a personal grievance of unjustified dismissal. My reasons for reaching this view are as follows.

*The thoroughness and accuracy of the respondent's analysis of the applicant's email use*

[19] Mr Pritchard had produced a report as part of the respondent's investigation into the applicant's misconduct which analysed various aspects of the applicant's computer and telephone usage. The report contained various appendices. One appendix showed the web usage by time of the respondent's staff. This showed clearly that at least 20 staff had greater web usage by time compared to the applicant over the period in question. This was unexplained, but as internet access was one of the issues cited in the dismissal letter, it is something I cannot ignore when deciding whether a fair and reasonable employer could have viewed the applicant's internet use as of an unacceptable level.

[20] The report also stated that the respondent had analysed the applicant's emails between 1 January 2011 and 8 September 2011. However, another appendix attached to it stated that it related to another period, 31 March 2011 and 28 September 2011, and that during this period the applicant had sent 436 emails and received 8,516 emails, taking up 911 Mb of space. This, the report stated, represented over 50% more emails sent and received than the next user, with more than twice the bandwidth used of the next highest user. However, a cursory perusal of the appendix also shows that, whilst the applicant had received a significant number more emails compared with anyone else, he had certainly not sent more than anyone else, with four more individual users having sent more during the period sampled.

[21] Another appendix relied upon in the report states that a snapshot of the applicant's email communications between 1 January 2011 to 8 September 2011 had been taken from both an active PowerNet email account and an archived pst. file containing old communications between 18 June 2002 and 7 July 2011. Although the appendix stated that it was just a sample of the information, it does not say what proportion of the total the sample comprises. A table in this appendix then shows that

a total of 212 emails were contained in the sample spanning 1 January 2011 to 8 September 2011, involving 13 different contact organisations, none of which related to the applicant's work. However, the table does not distinguish between emails sent and emails received.

[22] A number of folders were shown to me which I understood to be print outs of the sample emails to and from the contact organisations, together with some attachments and spreadsheets found on the applicant's computer. However, many of the emails were historical, some dating back to 2004, whilst several were dated 2010. This did not accord with the stated sample period of January to September 2011.

[23] When an employer relies on a large volume of data to demonstrate serious misconduct, it must in my view take reasonable pains to ensure that its analysis of that data is transparent and fair. The apparent discrepancies highlighted above raise the possibility that, although the process involved in the respondent's gathering together of evidence may have been extensive, the subsequent analysis of the evidence may have been less thorough. The documents put before me raised a number of questions as to the fairness of the process followed by the respondent when it reached the conclusion that there had been such a volume of personal email activity that it overreached the boundary between what may be misconduct and serious misconduct. Whilst it may be that these questions can all be satisfactorily answered by the respondent in a substantive investigation meeting, at present they have not been, and so an arguable case arises.

*Was it fair to rely upon the applicant's on-line subscriptions?*

[24] One of the categories of emails and other materials which the respondent had found had been a misuse of their property comprised on-line subscriptions by the applicant to publications such as the National Business Review (NBR), the Times, the CEO Institute, Time Magazine, the Reserve Bank and others. The applicant had contended in his defence that a manager should be well informed, and that the respondent had actually put the applicant on a hard copy circulation list of the NBR in any event, but that he had also taken out an on line subscription because he had been receiving the hard copy too late for it to be of topical use. The respondent's concern was that the applicant had been subscribing to these publications to further his own

business interests and that the mischief caused was that the subscriptions took up too much storage space on their server. However, apart from a reference in the computer policy to purging mailboxes regularly to relieve capacity on the server, the computer policy does not appear to prohibit on-line subscriptions of this sort. A doubt is raised in my mind as to whether it had been fair to rely on the applicant's on-line subscriptions when he had apparently not been clearly warned previously that such activity would be viewed as a misuse of the respondent's property.

### *Telephone usage*

[25] A separate analysis had been carried out of the applicant's landline and mobile telephone usage, and it had been determined that around 45% of all the calls made over a six month period (443 out of 952) were of a personal nature, many seemingly relating to his personal businesses. However, it appears from the documents put before me that this figure had been reached partially by way of extrapolation and assumption.

[26] I note that the HR Manager, Ms Ellis, who investigated the applicant's telephone use, deposes in her affidavit that *not every phone number had been rung, so it was highly likely that the report was an under estimated figure, a very limited number of mobile numbers were rung and where a mobile phone number had been rung straight away after a personal call, it was been assumed [sic] that this was also a personal call.* She also states in her affidavit that her report to Mr Pritchard included *a spread sheet which was a selection of incoming calls made to Kana's phone, on days when there was a high percentage of personal calls. Again this was done on a percentage of all calls made basis. It was very hard to get a good indication of incoming calls as a great many of the numbers were not listed.*

[27] The assumptions made by Ms Ellis that unknown calls were personal ones raises the possibility that the respondent's assessment of the scale of the applicant's misuse of the telephones was exaggerated.

[28] I also note that, in the report created by Ms Ellis in respect of the applicant's telephone activity, calls made to the Ashlar Motel, where the applicant's wife worked, were seemingly included in this total of private business related calls, even though the

respondent's counsel told me during the interim hearing that these calls had not been included.

[29] The respondent had accepted that limited personal calls were permitted, and the employment agreement and computer policies do not expressly prohibit personal calls. Again though, as the respondent wishes to rely upon data to show an excessive amount of personal telephone calls that go beyond the accepted practice within the respondent company, it is necessary to be reasonably confident that its analysis was sufficiently robust for it fairly and reasonably to reach that conclusion.

[30] In addition, although the applicant's telephone usage formed part of the reason for dismissal as stated in the dismissal letter, there was no evidence that the applicant's level of personal phone calls had ever been previously criticised.

[31] I believe that a sufficient question is raised to enable the applicant to show that, in respect of the respondent's conclusions in relation to the applicant's telephone usage, he has an arguable case.

*Did the applicant believe that he would be told if monitoring of his email usage revealed further concerns?*

[32] A significant issue that I believe gives rise to an arguable case on its own relates to the applicant's assertion that he was not aware that his activities were giving concern and that he had understood from the emails from Mr Pritchard of 2009 and 2010 that, as his usage was being monitored, he would be told if they were giving concern. Mr Pritchard, in his affidavit, deposed that: *the applicant was correct in saying that he was told that his email use/volume would be monitored and that if there were issues he would be told.*

[33] The respondent also concedes that the two emails from Mr Pritchard sent in 2009 and 2010 were not formal warnings.

[34] I therefore believe that there is an arguable case that the applicant reasonably expected a warning if his email and computer use would be regarded as having become unacceptable again. This in itself could be sufficient to render the dismissal

unjustified if, after a substantive hearing, the applicant's stated understanding is found, on the balance of probabilities, to have been genuine and reasonably formed.

*To what extent was the dismissal related to a perceived shortfall in the applicant's performance?*

[35] Counsel for the respondent submitted that the applicant's performance had been called into question as a result of the time he had seemingly spent working on his own private matters in the respondent's time. An affidavit by Mr Robert Walton, the respondent's CEO, deposed that, *by virtue of the time spent and use of PowerNet's equipment, Kana's business dealings have affected his performance at PowerNet.*

[36] Mr Walton also deposed that, on several occasions, he had found the applicant had failed to respond to requests from him to look at better ways of managing the control room to reduce costs and improve efficiency, and that, in July 2011, the applicant had failed to understand or focus on a task he had given him.

[37] However, as counsel for the applicant pointed out, this was not an issue that had been raised formally by the respondent during the disciplinary process. I note that in the notes of a meeting between the applicant and the respondent on 12 October 2011, Mr Walton is recorded as having said *The issue is not with poor performance, it is a question of fidelity.* However, in his affidavit, Mr Walton states *Kana's business dealings have affected his performance at PowerNet.* Counsel for the respondent had confirmed that no analysis had been attempted to work out the proportion of private business carried out by the applicant during his breaks and lunch times and that inferences had been drawn that most activities had occurred during work time given the volume of personal emails and calls that had been uncovered.

[38] I believe that the discrepancy between Mr Walton's affidavit and what he had said in the 12 October meeting, together with the fact that no mention of performance had been made in the respondent's letter to the applicant of 25 October 2011 in which the respondent had invited the applicant to make submissions on its preliminary conclusion that serious misconduct had occurred, does raise a question of procedural fairness, as the applicant had not been given any opportunity to comment on concerns

about his performance, or on the express examples cited in Mr Walton's affidavit. This also therefore shows that there is an arguable case.

*Is there an arguable case on substantial fairness?*

[39] A separate issue to be considered is whether it was substantively fair to dismiss the applicant. If there was no discernible impact on the applicant's performance (or if there was, but the concern had not been made known to the applicant prior to dismissal), the issue becomes one of the applicant using bandwidth to send and receive emails relating to his personal business, company server space to store electronic data, and company time to deal with his personal business. (The respondent had already declared to the applicant during the disciplinary process that the incurring of cost by him making personal telephone calls was not a concern).

[40] Whilst the employment agreement refers to two categories of serious misconduct that the applicant had been found to have committed, (*unauthorised use of property of the employer* and *unauthorised access to the employer's computer system*) merely having been literally in breach of the two prohibitions should not, in itself, automatically justify the dismissal of an employee, as it is a matter of degree of the breach that is to be taken into account. As I have already indicated, questions arise as to the accuracy of some of the respondent's analysis of the data relied upon in concluding that there was *extensive and unacceptable use of* [the respondent's] *landline and mobile phones, email and internet access, software, server and time for the purposes of conducting* [the applicant's] *own private business affairs*. Further investigation of the respondent's analysis may lead the Authority to determine that the use was not as extensive (and so, not reasonably to be held to be unacceptable) as the respondent had concluded.

[41] In addition, it appears to me that, when viewed in its complete form, the second category of serious misconduct relied upon (*unauthorised access to or interference with the Employer's computer systems including deleting, wiping, altering, copying or damaging any parts thereof*) prohibits an employee accessing a part of the system he is not allowed to access, rather than being permitted to access the system but doing so for a purpose which is unauthorised.

[42] Taking into account all these issues, I am persuaded that the applicant does have an arguable case that he has a personal grievance for unjustified dismissal.

### **Arguable case for reinstatement?**

[43] Reinstatement is no longer a primary remedy but remains one measure which may be selected from the range of remedies provided at s123 of the Act to settle a personal grievance, provided it is “*practicable and reasonable to do so*”.

[44] The most recent case in which the Court of Appeal examined practicability of reinstatement was *Lewis v Howick College Board of Trustees* [2010] NZCA 320. The Court of Appeal reiterated the Court of Appeal’s judgment in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [2010] NZCA 320 (*NZEI*) which had, in turn, affirmed the test applied by the Labour Court in first instance in that case. The Employment Court in *NZEI* said:

*Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future..... Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.*

[45] The Employment Court in *Angus v Ports of Auckland* held, when considering the new requirement of reasonableness, as follows:

*[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties’ cases so far as the prospective consideration of reinstatement is concerned.*

*[66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the*

*Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.*

*[67] Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.*

*[68] The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.*

[46] The respondent has not replaced the applicant but states that there are other considerations which should persuade me that there is no arguable case for reinstatement. Primarily, the respondent refers to a loss of trust and confidence in the applicant, which is genuinely and reasonably held, following the applicant having been warned for similar conduct in the past and his apparently paying no heed to his employer's concerns. I accept that Mr Walton and Mr Pritchard may have lost trust and confidence in the applicant, but am mindful that their conclusion may have arisen out of assumptions having been made and inferences drawn which have been based upon data which may not have been thoroughly and fairly analysed for the reasons stated above.

[47] In addition, the loss of trust and confidence derives from what Messrs Walton and Pritchard view as a wilful disregard of the respondent's directives in relation to his email usage. It is possible, however, that the applicant was expecting to be told if the respondent viewed his usage as unacceptable before being dismissed. In that sense, the wilfulness leading to the loss of trust and confidence may not in fact comprise an element of the applicant's conduct.

[48] The respondent cites the applicant's criticisms of Mr Pritchard in regard to the Authority's duty to consider the effects on other parties of reinstatement. The applicant did state in his affidavit that his relationship with Mr Pritchard *has not been easy*. He then cited alleged refusals by Mr Pritchard to allow the applicant to attend health and safety workshops and conferences and other meetings; Mr Pritchard transferring his staff to other departments without consultation; an alleged unreasonable and unsafe work order from Mr Pritchard; Mr Pritchard refusing to approve credit days and questioning the applicant's mileage claims. Mr Pritchard deposes in reply that he believes that the applicant and he have worked well together and explains each allegation.

[49] The issues raised by the applicant in his affidavit in respect of Mr Pritchard were all historical and appear to have been resolved at the time they arose. The applicant had clearly raised these issues in his affidavit to suggest that there had been a history which may have explained his dismissal. Documentary evidence supported the contention by the applicant that he had raised concerns, or that concerns had been raised with him about various issues. However, Mr Pritchard's assertion that he felt that he had worked well with the applicant does not signal an excessively adverse impact on him if the applicant were to be reinstated at the end of a substantive hearing.

[50] Every contested employment relationship problem raises a possibility that the parties' relationship will be strained by the process, but this cannot in itself prevent a reinstatement. My observation of this case is that communications between the parties and their respective lawyers have so far been at all times respectful and proper, and I have seen nothing which strays outside of the normal cut and thrust of proceedings of this sort. I therefore do not consider that Mr Pritchard would be unduly affected by the applicant's reinstatement.

[51] Overall, therefore, I am satisfied that if the applicant's dismissal were to be determined following the substantive hearing to have been unjustified, there is an arguable case that it would be both practicable and reasonable to reinstate him.

### **Balance of convenience**

[52] The Authority must weigh the relative inconvenience – in the sense of detriment or injury – to the respondent of having to bear the burden of an order reinstating the applicant until his substantive case is heard, against the inconvenience

to the applicant who may have a just case, of having to bear the detriment of unjustifiable action until his case is heard. *X v Y Limited* [1992] 1 ERNZ 863, 872-3 (CA).

*Factors favouring the respondent*

[53] Whilst counsel for the applicant made a valiant attempt to argue that the loss of a salary in the region of \$100,000 per annum causes financial hardship per se, evidence from materials recovered from the applicant's work computer suggests that he is not impecunious, and that his personal business interests earn him a sufficient income on which to live comfortably. Since his dismissal he has also been working assisting his wife in a hotel which they own.

[54] Counsel for the applicant had referred to the fact, which I accept, that the applicant would have to leave Southland to find a new job of the kind he had carried out in the employment of the respondent. He had lived in Southland for 22 years and had made great efforts to assimilate into the culture of rural New Zealand. I accept that the applicant will not find the same work in Southland as he carried out for the respondent, but note that the applicant has sufficient business interests in Southland to enable him to retain his links with the region.

[55] It was also argued that the applicant had built up a good reputation in Southland, and that to have to leave Southland to seek alternative work would impact on that reputation. The respondent argued that that reputation arose out of his property ownership and business dealings rather than his role as a Systems Control Manager. My view is that both arguments probably carry some truth, as the applicant had been required to deal with the public in his role as Systems Control Manager.

[56] The substantive hearing is set down for 1<sup>st</sup> and 2<sup>nd</sup> March, which is not a significantly lengthy period for the applicant to wait. Although the determination would be reserved, there is no reason currently to suppose that the substantive determination would not be released before the end of March 2012. This is therefore not a substantial delay between dismissal and determination.

*Factors favouring the applicant*

[57] The applicant is aged 59 and has been carrying out a specialist role of System Control Manager for several years. Although the respondent stated that the applicant was an engineer by training, and so could take roles within Southland as an engineer, such roles would probably not pay as much as his role with the respondent. However, despite the applicant's independent financial means, it is reasonable for the applicant not to have his specialist skills atrophy or disappear altogether by him carrying out work which does not utilise those specialist skills.

[58] It is for this reason that I am also content to conclude that monetary compensation alone would not be an adequate remedy for the applicant were he to succeed at the substantive stage.

[59] Furthermore, the applicant's age would undoubtedly make it relatively harder for the applicant to find alternative positions of any kind compared to other, younger, job seekers and that it would also probably make retraining more of a challenge.

[60] The applicant will almost certainly have no problem meeting his responsibilities under the undertaking if he were to fail at the substantive stage of the investigation, given his multifarious business interests.

[61] The applicant has indicated through counsel that he would accept being reinstated on conditions, and his suggestion prior to his dismissal that he be given a final written warning indicates an acceptance that he had overstepped the mark in his computer and telephone usage. His recognition and contrition in that sense therefore suggests to me that he can be successfully counselled in proper usage of these tools were he to be reinstated on an interim basis.

[62] The respondent has said that, were the applicant to be reinstated, there would be a risk that he may carry on the same private business activities that he had been dismissed for, and that this risk was greater because the applicant would work unsupervised. However, the respondent has already demonstrated in its disciplinary investigation that it can monitor the applicant's email, internet and telephone usage remotely using its ICT resources. The respondent is a substantial employer with

substantial resources at its disposal and it is hard to imagine that monitoring the applicant's IT and telephone activities would represent an untenable burden. It may also be able to impose bars on visiting certain websites and calling certain numbers.

[63] The respondent said that it could not prevent the applicant from receiving private telephone calls. However, the applicant could be given another mobile number and landline number to help prevent that problem.

[64] In short, I do not believe that the respondent's concerns about misconduct being repeated behind their back stands up to practical scrutiny.

[65] The respondent has likened the applicant's job to that of an air traffic controller, and states that, as the applicant works unsupervised, if he were to be reinstated on an interim basis, with the pending substantive investigation meeting weighing on his mind, his performance could be compromised and so the emergency work of the respondent compromised in turn.

[66] I confess to finding this assertion to be exaggerated. First, no evidence has been presented to suggest that the applicant cannot work safely under pressure. Indeed, everyone has to cope with the vicissitudes of life, whatever they are, and the impending substantial investigation meeting is not likely to adversely impact upon the applicant more than any other important life event that may occur.

[67] Second, whilst no evidence was presented directly on this, the applicant's interim reinstatement would occur in the summer, when the kinds of emergencies faced by the respondent as referred to in passing in some of the documentation before me (storms, high winds and snow) are presumably less likely to occur. The substantial hearing will take place before winter sets in.

[68] The applicant is aged 59 and carried out a role for which I am satisfied no equivalent exists within Southland. The respondent suggested that the applicant is trained as an engineer and that engineering jobs in Southland do exist, although they would be on a lower level than the applicant's position with the respondent. The applicant had carried out his role with the respondent for many years and I accept that

he would probably reasonably prefer to continue to do a job that was specialised, relatively senior and carried responsibility.

[69] Counsel for the respondent asserted that the applicant had lied in his affidavit when he had deposed that he had been *a long standing employee with no previous formal warnings*. The respondent asserts that this is patently untrue because of the 2007 warning, and so renders the applicant's evidence unreliable. The applicant produced an affidavit from Mr Donnelly, a solicitor at Preston Russell Law, who had drafted the applicant's affidavit. That deposed that Mr Donnelly had missed the warning letter when drafting the affidavit and that he had advised the applicant, when the applicant had referred him to the warning that he had received in 2007, that it was correct to state that there had been no warnings as there had been no formal warning on file.

[70] I accept this deposition from Mr Donnelly and do not attribute any bad faith on the applicant's part in respect of his mistaken reference to having had no previous formal warnings.

[71] The applicant has also asserted that the respondent had acted in bad faith when their counsel had referred to possibly involving the police when the matter was being investigated in the early stages. Having examined the correspondence, I am satisfied that the references to the police arose from the respondent's counsel not wanting to shut the door on involving the police. The correspondence between respective counsel on this issue is as one would expect, and I do not attribute any bad faith on the part of the respondent arising from it.

### **Overall justice**

[72] In its exercise of the discretion to grant interim reinstatement the Authority must consider where the overall justice of the case lies until it can be heard, including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage. *Cliff v Air New Zealand* [2005] ERNZ 1 at [18] (EC). This requires me to stand back and take a global view.

[73] In concluding that interim reinstatement should be ordered, subject to the conditions that follow, I take into account the probability that the mischief that could occur, were the applicant to repeat his conduct that led to his dismissal, is not such as to create a material risk to the respondent's assets, reputation or staff. In reaching this conclusion, I am mindful that the applicant's overall performance and ability to carry out his role had not been challenged by the respondent prior to dismissal. The issue of concern for the respondent had been that the applicant had been using its time to carry out his own private business and that he had been using up *bandwidth* in doing so. This concern can be effectively policed by the respondent.

[74] Although Mr Walton expressed concern about the applicant's performance in his affidavit, this was an *ex post facto* complaint which had not been put to the applicant prior to his dismissal. Insofar as the respondent fears that, if he were to be reinstated, the applicant could be distracted by his private business affairs at work and that this could go unnoticed because the applicant would work unsupervised, documentation disclosed by the respondent in its affidavit evidence leads me to believe that Mr Pritchard had already been keeping account of the applicant's performance and was quick to pick up what he perceived as issues. The respondent had never taken formal steps to address any concerns at the way in which the applicant dealt with emergency work.

[75] I also take into account that the applicant is aged 59 years of age, that he has been working in a specialised area for several years and that the longer he is away from the workplace the more likely it is that his skills will atrophy.

[76] I also take into account the applicant's acceptance that he had overstepped the mark and that he deserved a final written warning. Insofar as this may be an insincere acknowledgement of blame, which I do not believe to be the case, the respondent can easily catch further misconduct by way of the monitoring I refer to above.

[77] I believe that the overall justice of the case favours interim reinstatement.

## Orders

[78] Counsel for the respondent submitted that, were the applicant to be reinstated, the respondent would want him to be reinstated on paid leave, due to the risks they perceive in his return to work. Alternatively, they would wish to place him on engineering or project work where he could be supervised.

[79] One of the reasons I believe interim reinstatement to be justified is that the applicant's role is specialised and I have concerns that his skills could atrophy if he were to be removed from them for a substantial period of time. The proposal of paying the applicant to stay at home does not address my concern therefore, and I decline to order that condition.

[80] S. 123 (a) of the Act provides that reinstatement, if granted, *is of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee*. Although no substantial evidence was given of what the engineering and project work would entail, it was clear that it excluded an element of the applicant's work which entitled him to work unsupervised. This alternative to interim reinstatement to the applicant's former position cannot, in my view, satisfy s 123 (a), and so I decline it.

[81] I order reinstatement of the applicant on an interim basis to his former position of System Control Manager in Invercargill on the following conditions:

- (i) Reinstatement will commence with effect from Monday 9 January 2012, after the Christmas and New Year break.
- (ii) The respondent may, at its discretion, require the applicant to undergo an induction or other training process to enable him to get back up to speed with his role before he resumes his former duties, provided such induction or training does not delay the resumption of duties beyond Monday 16 January 2012.
- (iii) The respondent may put in place such monitoring of the applicant's computer and telephone usage as is consistent with the terms of the respondent's computer policy dated 10 February 2010.

- (iv) The respondent may place such controls or bars on the applicant's computer and telephone usage as it believes is necessary to prevent abuse of such equipment, provided that such bars do not materially interfere with the applicant's ability to carry out his duties as System Control Manager.

[82] Finally, I encourage the parties to consider mediation before the reinstatement takes effect, or if the holiday season prevents that, immediately afterwards.

**Costs**

[83] Costs are reserved.

David Appleton  
Member of the Employment Relations Authority